

New Hampshire Judicial Council
Eligibility Guidelines and Performance Standards: Capital Post-Conviction Representation
Approved: September 2015

New Hampshire's use of the death penalty obliges the government to ensure that capital defendants in post-conviction proceedings have access to able and experienced counsel in order to protect their rights and legal interests in an arena that is widely recognized as "legally complex and fact intensive," (See generally, McFarland v. Scott, 512 U.S. 849, 855-56 (1994), "this Court's death penalty jurisprudence unquestionably is difficult even for a trained lawyer to master..." (quoting Murray v. Giarratano, 492 U.S. 1, 28 (1989)).

Counsel for a condemned defendant in post-conviction proceedings must be experienced and qualified. Standards established by the American Bar Association require post-conviction counsel to "litigate all issues, whether or not previously presented, that are arguably meritorious...." (American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.15.1(c)). Every professional effort should be made by post-conviction counsel to preserve all issues for subsequent review. *Id.* With the defendant's life in the balance, critical procedural and technical deadlines and requirements pose dangerous traps for the unwary and inexperienced, and the interplay between State and Federal law and procedure demand that counsel demonstrate fluency in a highly specialized field of practice to which few lawyers are exposed, particularly in a death penalty jurisdiction that has not carried out any executions for many decades.

The Judicial Council is the government agency responsible for ensuring the quality and effectiveness of appointed counsel. In the event that a New Hampshire court exercises its discretion to appoint counsel for a defendant in State-court capital post-conviction proceedings, it will be the Judicial Council's obligation to find qualified counsel to represent the defendant and to ensure that appointed counsel's performance meets recognized standards. The Judicial Council has adopted the eligibility guidelines and performance standards below, which shall apply to counsel providing representation in post-conviction proceedings in New Hampshire courts in capital cases.

Eligibility Standards: Capital Post-Conviction Representation

In order to serve as lead counsel for a defendant in a capital post-conviction proceeding:

- Counsel shall have been a member of any bar for at least 5 years and must possess at least 3 years of experience in the field of post-conviction litigation.
- Counsel must be familiar with all state and federal appellate and post-conviction options available to clients and must demonstrate a familiarity with legal developments locally and nationally that may be relevant to the persuasive presentation of claims in state post-conviction proceedings.
- Counsel must provide a written proposal in advance of appointment that shows, based on the volume of the record and the circumstances of the defendant's case, that he or she can reasonably forecast, and meet, the demands of providing high quality representation.
- Counsel should be familiar with the procedure for setting execution dates and providing notice of them. Counsel should also be thoroughly familiar with all available procedures for seeking a stay of execution.
- Counsel must demonstrate a thorough understanding of how to preserve a client's right to federal review, including ensuring that a client is not time-barred from seeking relief.
- Counsel must be familiar with the capital post-conviction performance standards promulgated by the New Hampshire Judicial Council.

Performance Standards: Capital Post-Conviction Representation

1. Counsel in capital post-conviction proceedings should be familiar with and comply with these performance standards, except when clearly inapplicable to the representation of the client in the post-conviction period of the case. Counsel should be familiar with all state and federal appellate and post-conviction options available to the client, and should consider how any tactical decision might affect later options. Counsel must also:

- a. Maintain close contact with the client regarding litigation developments;
- b. Continually monitor the client's mental, physical and emotional condition and closely monitor the client's competence, having regard to the requirement that the client be sufficiently competent to be lawfully executed. Counsel must investigate and litigate this issue when it is possible that the client does not meet the necessary degree of competence;
- c. Keep under continuing review the desirability of modifying prior counsel's theory of the case in light of subsequent developments;
- d. Take all steps that may be appropriate in the exercise of professional judgment in accordance with these standards to achieve an agreed-upon disposition; and
- e. Continue an aggressive investigation of all aspects of the case.

2. Lead counsel in capital post-conviction proceedings shall be responsible for recruiting, assembling and coordinating the work of such other professionals, (including but not limited to co-counsel, local counsel, learned counsel, expert witnesses, investigators, mitigation specialists), as may be necessary to adequately prepare and litigate the petition or motion. Lead counsel shall be responsible for seeking orders under RSA 604-A for expert and ancillary services.

3. Counsel should monitor and remain informed of legal developments that may be relevant to the persuasive pursuit of claims in state post-conviction proceedings, in federal habeas corpus proceedings and in any application for a writ of certiorari to the United States Supreme Court as well as the preservation of claims for subsequent review in state and federal proceedings and international legal forums.

- a. Counsel should monitor relevant legal developments in and be aware of current legal claims pending in relevant cases in front of the New Hampshire Supreme Court, the First Circuit Court of Appeals and the United States Supreme Court.
- b. Counsel should monitor relevant legal developments in death-penalty states and under the federal death penalty statute.
- c. Counsel should monitor relevant legal developments in the federal courts of appeal, including splits between circuit courts of appeal.
- d. Counsel should monitor relevant developments in international law.
- e. Counsel should monitor legal developments in the area of execution methods.
- f. Counsel should participate in electronic mail listservs devoted to capital habeas representation.

4. Counsel should explain to the client counsel's role, how counsel was appointed to the case, and the meaning and goals of post-conviction and federal habeas corpus proceedings. Counsel should encourage the client to participate in the collateral review process.

5. Counsel shall consult with the client on the matters to be raised in any post-conviction petition or federal application for habeas corpus and give genuine consideration to any issue the client wishes to raise. What claims to raise, and how to raise them, are generally matters entrusted to the discretion of counsel. When counsel decides not to argue all of the issues that his or her client desires to be argued, counsel should inform the client of that decision, of the reasons for the decision, and of his or her right to request leave to file a *pro se* brief.

6. Counsel should obtain and review a complete record of all proceedings relevant to the case including the transcripts, pleadings, briefs, exhibits, the appellate record, the Superior Court file, the Supreme Court file, and the files in any other related or prior proceedings in the case.

7. Counsel should obtain and review all prior counsels' file(s). Post-conviction counsel should retain and preserve prior counsel's files as far as possible in the condition in which they were received until transmitted to successor counsel.

8. Counsel should ensure that the record of proceedings available for review is complete. If any item is necessary to post-conviction review but is not included in the record of proceedings, it is post-conviction counsel's responsibility to ensure that the record available for review is supplemented.

9. Counsel should interview the client and previous defense team members about the case, including any relevant matters that do not appear in the record. Post-conviction counsel should consider whether any potential off-record matters should have an impact on how post-conviction review is pursued, and what kind of an investigation of the matter is warranted.

10. Counsel should seek to investigate and litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules and any good faith argument for the extension, modification or reversal of existing law. Counsel should undertake a high quality, independent, exhaustive investigation. Counsel should not assume that investigation of issues by prior counsel has been complete or adequate.

11. The investigation and litigation of claims should encompass all arguably available claims for relief, including those based upon the grounds that:

- a. the defendant is in custody or the sentence was imposed in violation of the Constitution or laws or treaties of the United States;
- b. the execution of the defendant would violate the Constitution, laws or treaties of the United States or the Constitution or laws of the state of New Hampshire;
- c. the conviction was obtained in violation of the Constitution of the state of New Hampshire;
- d. the sentence was obtained in violation of the Constitution of the state of New Hampshire or is otherwise an illegal sentence;
- e. the court exceeded its jurisdiction;
- f. the conviction or sentence subjected the defendant to double jeopardy;
- g. the limitations on the institution of prosecution had expired;
- h. the statute creating the offense for which the defendant was convicted and sentenced is unconstitutional;
- i. the conviction or sentence constitute the ex post facto application of law in violation of the Constitution of the United States or the state of New Hampshire;
- j. the results of DNA testing performed pursuant to an application granted under RSA 651-D:2 proves that the petitioner is factually innocent of the crime for which he was convicted;
- k. the defendant is otherwise shown to be factually innocent of the crime for which he was convicted or not eligible for the death penalty; or,
- l. subsequent legal developments have favorably affected the defendant's case.

12. In conducting the investigation, counsel should have particular regard to the possibility that claims for relief may arise from matters not previously fully investigated or litigated, including:

- a. the possibility that the state failed to turn over evidence favorable to the defendant and material to his guilt or punishment;

- b. the possibility that the state knowingly used false testimony to secure the conviction or sentence;
- c. the possibility that the client received ineffective assistance of counsel as to either guilt or penalty in the course of his representation in the trial court or on appeal;
- d. the possibility that the jury's verdict is tainted by issues such as jury misconduct, improper separation of the jury, and false answers on voir dire examination;
- e. the possibility that judicial or prosecutorial bias or misconduct prejudiced the outcome of the case; and,
- f. the possibility that the client is innocent of the offense charged or not eligible for the death penalty.

13. In investigating the possibility that the client received ineffective assistance of counsel, post-conviction counsel must review both the record in the case and also conduct a thorough investigation of the facts and circumstances beyond the record in order to determine whether a claim exists that counsel's performance was deficient. Counsel shall conduct a sufficiently thorough investigation to determine whether prior counsel's responsibilities were met and to determine the extent of any resulting prejudice to the client.

14. In investigating and developing claims of ineffective assistance of counsel or the suppression of favorable evidence, counsel shall be aware that evidence will be assessed for its cumulative impact and so should not limit the investigation to only those matters that might, in and of themselves, justify relief. Instead, the investigation should extend to those matters which, in combination with others, may justify relief.

15. In investigating, preparing and submitting any motion for new trial or petition for a writ of habeas corpus, counsel should seek such discovery, compulsory process, requests for admissions, depositions and other orders as are available and appropriate to a high quality, independent, exhaustive investigation. Counsel should investigate the possibility of and, where appropriate, file an application for DNA testing pursuant to RSA 651-D:2.

16. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review. Claims raised should include federal constitutional claims which, in the event that relief is denied, could form the basis for a successful petition for writ of certiorari to the Supreme Court or for a writ of habeas corpus in the federal district court. Where pending claims in another case may be resolved in a manner that would benefit the client, counsel should ensure that the relevant issues are preserved and presented for review in the client's case and, where appropriate, counsel should seek to keep the client's post-conviction proceedings open pending the determination of the other case.

17. Petitions and supporting memoranda shall conform to all rules of court and shall have a professional appearance, conform to acceptable rules of grammar, be free from typographical errors and misspellings, shall advance argument and cite legal authority in support of each contention. Counsel shall utilize out-of-state and federal authority in support of positions when no local authority exists or local authority is contrary to the weight of recent decisions from other jurisdictions. Regardless of the existence of local authority, federal authority should also be relied upon to present and preserve for later review any federal constitutional claims, particularly any applicable decision of the United States Supreme Court.

18. Counsel should be scrupulously accurate in referring to the record and the authorities upon which counsel relies.

19. The post-conviction petition or motion should clearly allege a factual basis for each claim which, if established, would entitle the petitioner to relief and clearly allege all facts supporting the claims in the petition. Counsel shall include with the petition/motion all documents and exhibits that would establish or support the factual basis of the petitioner's claims, including but not limited to court records, transcripts, depositions, admissions of fact, affidavits, statements, reports and other records. In determining the scope of the material to be presented in state court, counsel shall have regard to the likelihood that federal review will be limited to the material presented in state court and so should not refrain from presenting any relevant material unless there are strong strategic reasons to do so.

20. Where counsel raises a claim that has previously been fully litigated in earlier appeal proceedings in the case, counsel shall fully investigate, prepare and submit an argument that the claim is nevertheless eligible for consideration in the interests of justice.

21. Where counsel raises a claim that was not raised in the proceedings leading to conviction or sentence, was not pursued on appeal or was not included in a prior post-conviction petition, counsel shall fully investigate, prepare and submit a claim that the failure to previously raise the claim is excusable.

22. The identification and selection of issues is the responsibility of lead counsel. Lead counsel shall adopt procedures for providing an "issues meeting" between the attorneys handling the case and other relevantly qualified attorneys, including at least one qualified as lead post-conviction counsel, at which the issues raised in the case and the defense theory in post-conviction can be discussed. The issues meeting will ordinarily be conducted in the course of a case review meeting under these standards but where this is not possible, the issues meeting should be conducted independently of the case review.

23. Counsel should complete a full review of the records of relevant proceedings, trial counsels' files and the fruits of the post-conviction investigation prior to completing a draft of the petition or motion. Lead counsel shall adopt a procedure for screening the petition or motion, which should include a careful review of the brief by an attorney not involved in drafting the petition or motion. The reviewing attorney should be qualified as lead post-conviction counsel.

24. The review of the records and files should be completed a sufficient time before the filing deadline to allow for the issues meeting, the drafting of the petition/motion, the review of the petition/motion and the finalization of the petition/motion. If post-conviction counsel is unable to complete the post-conviction investigation and prepare the petition/motion within the existing briefing schedule in a manner consistent with these standards and with high quality post-conviction representation, it is counsel's responsibility to file a motion to extend the filing deadline.

25. Counsel shall be diligent in expediting the timely submission of the post-conviction petition or motion.

26. Counsel may be unable to provide high quality representation due to a range of factors: lack of resources, insufficient time, excessive workload, poor health or other personal considerations. When counsel is unable to provide high quality representation in post-conviction proceedings, counsel must promptly bring this matter to the attention of the Indigent Defense Subcommittee of the Judicial Council. If the deficiency cannot be remedied then counsel must bring the matter to the attention of the court and seek the relief appropriate to protect the interests of the client.

27. Counsel should be aware of the statute of limitations for filing a petition for writ of habeas corpus in federal court, and should file pleadings in state court so as to allow adequate time for preparation and filing of such a petition if state post-conviction relief is denied.

28. Counsel should timely make application for interlocutory appeals if the trial court dismisses the petition/motion or otherwise denies relief on an application for post-conviction relief. Counsel should take great care to ensure that all applications comply with the requirements of the relevant rules of court and present all claims in a manner that will meet the exhaustion requirements applicable in federal habeas corpus proceedings. Counsel should ensure that an adequate record is created in the trial court to justify and encourage the exercise of the supervisory jurisdiction of the reviewing court.

29. A lack of adequate time, resources or expertise is not an adequate reason for failing to make application for interlocutory appeals or failing to respond to a state application. Where counsel lacks adequate time, resources or expertise, counsel should take all available steps to ensure that the defense team has sufficient time, resources and expertise, including advising the Indigent Defense Subcommittee of the situation and making application to the Court for additional resources. Counsel shall ensure that the role of lack of time or resources upon the decision to file a writ application is reflected in the record.

30. Counsel shall promptly inform the client of the decision of the trial court and any reviewing court in the client's case and shall promptly transmit to the client a copy of the decision. Counsel should accurately inform the client of the courses of action which may be pursued as a result of the decision.

31. Unless trial counsel or appellate counsel has filed the petition for a writ of certiorari in the Supreme Court of the United States, counsel representing the client in state post-conviction proceedings shall do so. If post-conviction counsel does not intend to file such a petition, he or she should immediately notify the Indigent Defense Subcommittee of the Judicial Council.

32. In preparing and filing a petition for certiorari, counsel should consider the benefit to the client of the support of amici and seek appropriate support where it is in the client's interests.

33. Counsel should be familiar with lethal injection protocols and the procedure for setting execution dates and providing notice of them. Counsel should also be thoroughly familiar with all available procedures for seeking a stay of execution. If an execution date is set, counsel should immediately take all appropriate steps to secure a stay of execution and pursue those efforts through all available forums.

34. In anticipation of the possibility that the client's state post-conviction application is unsuccessful, counsel shall provide advice to the client about other potential avenues for relief sufficiently prior to the finalization of state post-conviction proceedings to allow the client to take adequate steps to protect his rights to federal review. This advice should include information about federal habeas corpus relief; any applicable statutes of limitations; and the procedure for obtaining the assistance of counsel to represent the client in federal habeas corpus proceedings. Having regard for tolling, counsel shall advise the client of the actual period of time that will be remaining for filing a federal petition upon finalization of the state post-conviction proceedings.

35. Counsel shall promptly inform the Indigent Defense Subcommittee of the Judicial Council of the disposition in any capital post-conviction case.

36. Counsel shall take all necessary steps to preserve the client's right to federal review, including ensuring that the client is not time barred from seeking relief. Counsel shall be responsible for protecting the client's interests in this regard, including ensuring that a federal petition is filed while state post-conviction proceedings remain pending where the time remaining for filing a federal petition following finalization of the state post-conviction proceedings will be inadequate to allow a timely filing.

37. State post-conviction counsel may continue to represent the client in his federal habeas corpus proceedings only with the consent of the Indigent Defense Subcommittee and the informed consent of the

client. Adequate representation in federal habeas corpus proceedings will include an investigation of whether state post-conviction counsel provided ineffective assistance in failing to adequately raise a meritorious claim of ineffective assistance of trial or appellate counsel. Just as trial counsel is poorly situated to investigate or litigate his or her own ineffectiveness, state post-conviction counsel may be similarly limited. In these circumstances, the Indigent Defense Subcommittee should not ordinarily consent to continuing representation by state post-conviction counsel in the absence of: informed consent from the client obtained through independent counsel; and the assignment to the defense team of at least one attorney qualified and experienced in federal habeas corpus proceedings in capital cases who was not involved in the preparation and presentation of the state post-conviction petition.

38. When counsel's representation terminates, counsel shall cooperate with the client and any succeeding counsel in the transmission of the record, transcripts, file, and other information pertinent to post-conviction proceedings. Counsel should notify the client when the case assignment is concluded.